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CHUAH TIM LAN

v.

RHB BANK BHD & ANOR

B

HIGH COURT MALAYA, ALOR STAR
MOHD SOFIAN ABD RAZAK J
[ORIGINATING MOTIONS NO: 25-08-2006]
16 JUNE 2008

C ***ADMINISTRATIVE LAW:*** *Exercise of judicial functions - Judicial review - Application for - Whether applicant showed good grounds to warrant claim - Whether Industrial Court's decision tainted with procedural impropriety - Whether there were erroneous findings - Whether application should be dismissed*

D ***ADMINISTRATIVE LAW:*** *Remedies - Certiorari - Whether available - Whether applicant showed good grounds to warrant claim - Whether Industrial Court's decision tainted with procedural impropriety - Whether there were erroneous findings - Whether application should be dismissed*

E The applicant by way of notice of motion (encl. 1) sought, *inter alia*, for leave to be granted to the applicant for judicial review with regard to the award made on 13 January 2006 and for leave to be granted to the applicant for an order of *certiorari* that the Industrial Court award made dismissing the applicant's application
F for reinstatement be quashed forthwith. The applicant was dismissed from the service of the first respondent for a serious act of misconduct. Dissatisfied, the applicant made representation to the Director General for Industrial Relations under s. 20(1) of the Industrial Relations Act 1967 ('the Act'). Acting under s. 20(3) of
G the Act, the honourable Minister of Human Resources referred the applicant's representation to the Industrial Court for adjudication. The event which precipitated in the striking out of the applicant's claim occured on 26 September 2005 where the case was fixed for hearing with the presence of the respondent's representative
H and their counsel whereas the applicant and her counsel were not present. The applicant's counsel had applied to postpone the hearing on 26 September 2005 to 27 September 2005 on the ground that the learned counsel for the applicant was engaged in Sungai Petani. The first respondent's counsel objected to the
I application to adjourn the hearing and had applied for the applicant's claim to be struck out in view of the absence of the

applicant and her counsel. In the circumstances, the Industrial Court struck out the applicant's claim against the first respondent with liberty to apply for reinstatement within 14 days. The applicant through her solicitors filed a notice of application for reinstatement. The issue before the court was whether on the facts there were good grounds to warrant reinstatement of her claim.

Held (dismissing applicant's application):

(1) Based on the unrebutted evidence adduced before the Industrial Court, prior to 26 September 2005, neither the applicant nor her counsel made any application to the Industrial Court to adjourn/postpone the continued hearing scheduled on 26 September 2005 on the ground that the applicant's counsel would be engaged in the Sungai Petani Sessions Court or that the said date was unsuitable. In fact, both the applicant and her counsel were absent on the hearing scheduled on 26 September 2005. The applicant and her counsel had adopted a lackadaisical attitude and took it for granted that the court would grant an adjournment/ postponement of the hearing. (para 23)

(2) No reasons were provided as to why priority was not given to the continued hearing before the Industrial Court despite the alleged merits of the applicant's claim against the first respondent. Although one Izham, the pupil in chamber appeared before the learned chairman of the Industrial Court on behalf of the applicant's counsel and applied to adjourn the continued hearing, he could not provide any explanation to the learned chairman of the Industrial Court's query as to why the applicant's counsel was in Sungai Petani Sessions Court when the applicant's claim against the first respondent was scheduled for hearing on the very same day. (para 23)

(3) It was fair and just for the Industrial Court to have refused the application to postpone the hearing and to strike out the applicant's claim against the first respondent on 26 September 2005 based on the grounds submitted by the first respondent. The learned counsel for the applicant had on several other occasions caused the proceeding to be delayed or postponed for failure to be present. The chairman of the Industrial Court further considered the failure by the applicant and her counsel to appear on 26 September 2005 as the 'last straw which

breaks the camel's back.' The applicant had failed to show good grounds to warrant reinstatement of her claim. The Industrial Court had properly appreciated the facts and the law in considering the merits of the applicant's application for reinstatement and its decision making was not tainted with procedural impropriety. Accordingly, the Industrial Court did not err in law or in fact in handing down the striking out award. (paras 25, 30 & 38)

Case(s) referred to:

Abdul Mutalib Dato' Seri Razak v. The Malaysian Bar & Anor [1998] 2 CLJ 749 HC ***(refd)***

American International Assurance Co Ltd v. Dato' Lam Peng Chong & Ors [1999] 2 CLJ 771 CA ***(refd)***

Bank Pusat Kerjasama Bhd (in receivership) v. Mahkamah Perusahaan Malaysia & Anor [1994] 4 CLJ 341 HC ***(refd)***

Council of Civil Service Unions v. Minister for the Civil Service [1985] AC 374 ***(refd)***

Guardian Security Consultants Sdn Bhd v. Joe Helen M Ponnu [2003] 3 ILR 993 ***(refd)***

Quah Swee Khoon v. Sime Darby Bhd [2001] 1 CLJ 9 CA ***(refd)***

R Rama Chandran v. Industrial Court of Malaysia & Anor [1997] 1 CLJ 147 FC ***(refd)***

Sim Kooi Soon v. Malaysia Airline System [2005] 2 CLJ 797 HC ***(refd)***

Legislation referred to:

Industrial Relations Act 1967, ss. 20(1), (3), 29(g), 30(5)

Legal Profession Act 1976, s. 77

Legal Profession (Practice and Etiquette) Rules 1976, rr. 6(a), 24(a)

For the applicant - Mohamad Nizan Azdahari; M/s Andrew Paul & Assoc
For the 1st respondent - M/s Zul Rafique & Partners
For the 2nd respondent - Chairman, Industrial Court Malaysia

Reported by Suhainah Wahiduddin

JUDGMENT

Mohd Sofian Abd Razak J:

[1] The applicant by way of notice of motion dated 13 March 2006 (encl. 1) filed in court with the affidavit in support (encl. 2) seeking *inter alia* the following relief namely:

(a) that leave be granted to the applicant for judicial review with regard to the award made on 13 January 2006 in the Industrial Court Case No: 3(9)/74-797/02.

(b) that leave be granted to the applicant for an order of *certiorari* that the Industrial Court Award made on 13 January 2006 dismissing the applicant's application for reinstatement be quashed forthwith.

(c) that costs in the cause.

[2] On 20 April 2007, the court after perusing the affidavits filed herein and reading the written and hearing oral submissions by both learned counsels for the applicant and the respondents dismissed applicant's application (encl. 1) with costs. The applicant who is dissatisfied with the said decision has since filed an appeal.

Factual Matrix Of The Case

[3] On 20 January 2000, the applicant was dismissed from the service of the first respondent for a serious act of misconduct. Dissatisfied, the applicant made representation to the Director-General for Industrial Relations under s. 20(1) of the Industrial Relations Act 1967 (hereinafter referred to as 'the Act') on 14 February 2000. On 5 February 2002, the Honourable Minister of Human Resources acting under s. 20(3) of the Act, referred the applicant's representation to the Industrial Court for adjudication. The applicant's claim against the first respondent was registered as Case No: 3(9)/4-797/02 and was fixed for continued hearing on 26 September 2005 and 27 September 2005 respectively.

[4] The event which precipitated in the striking out of the applicant's claim happened on 26 September 2005 where the case was fixed for hearing with the presence of the respondent's representative and their counsel whereas the applicant and her counsel were not present.

[5] At about 10am on the said date, after the Industrial Court interpreter contacted the applicant's solicitor to be present forthwith, En. Izham, who was the pupil in chamber appeared before the learned Chairman of the Industrial Court on behalf of the applicant's counsel, En. Mohamad Nizan bin Azdahari (hereinafter referred to as 'the applicant's counsel'). The applicant's counsel had applied to postpone the continued hearing

on 26 September 2005 to 27 September 2005 on the ground that the learned counsel for the applicant was engaged in Sungai Petani.

[6] The learned counsel for the first respondent objected to the application to adjourn the hearing on 26 September 2005 and had applied for the applicant's claim to be struck-out in view of the absence of the applicant and her counsel. In the circumstances, the Industrial Court struck out the applicant's claim against the first respondent with liberty to apply for reinstatement within 14 days on 29 September 2005. The applicant's solicitors received the striking out award on 6 October 2005.

[7] The applicant had through her solicitors, filed a notice of application for reinstatement on 14 October 2005. After exchanges of affidavits between the parties, the hearing of the applicant's application to reinstate Case No: 3(9)/4-797/02 proceeded. Upon hearing submissions from both parties, the learned Chairman reserved his decision to 13 January 2006 whereby he dismissed the applicant's application to reinstate Case No: 3(9)4-797/02.

The Law And Scope Of Judicial Review

[8] It is trite law that in judicial review proceedings of an award of the Industrial Court, the High Court does not exercise appellate power (*American International Assurance Co. Ltd. v. Dato' Lam Peng Chong & Ors* [1999] 2 CLJ 771).

[9] It is also settled law that the High Court will not interfere with a decision of Industrial Court unless it can be conclusively established that the decision is infected with errors of law. The errors of law that merit curial intervention by the High Court was formulated by Lord Diplock in the celebrated case of *Council of Civil Service Unions v. Minister for the Civil Service* [1985] AC 374 and adopted by our Federal Court in the case of *R Rama Chandran v. The Industrial Court of Malaysia & Anor* [1997] 1 CLJ 147, which stated as follows:

> (a) Illegality – that the decision-maker had failed to keep strictly within the perimeters of his powers;

(b) Irrationality or "Wednesbury unreasonableness" – that the decision was 'so outrageous in its defiance of logic or accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it'; and

(c) Procedural Impropriety – that the decision-maker failed to observe basic rules of natural justice and/or procedural rules.

[10] There are no dearth of authorities to state that where a conclusion reached by the Industrial Court is supported by evidence and is in accordance with the governing principles of law, the High Court ought not to interfere with the decision of the Industrial Court.

[11] In the Court of Appeal case of *Quah Swee Khoon v. Sime Darby Bhd* [2001] 1 CLJ 9, Gopal Sri Ram JCA after a review of the authorities stated:

> Our response to counsel is that each case depends upon its own facts for the appropriate legal result. It is to be noted that neither *Amanah Butler* nor *Swedish Motor Assemblies* were cases that turned upon creditability of evidence. Such findings are in our judgment immunized from judicial review: *William Jacks & Co (M) Sdn Bhd v. S Balasingam* [1997] 3 CLJ 235. Whether a High Court has exercised appellate functions depends upon the approach taken in a particular case. If a judge to whom application is made for *certiorari* inquires into and disturbs findings of fact based on the creditability of witnesses, he does indeed exercise appellate functions. It is important to remember that in judicial review proceedings the High Court must accept as gospel findings of fact made by the Industrial Court based on credibility of witnesses. As was observed by Mohd Azmi FCJ in *Wong Yuen Hock v. Syarikat Hong Leong Assurance Sdn Bhd and Another Appeal* [1995] 3 CLJ 344 at p 348:
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> > *In exercising judicial review, the High Court was obliged not to interfere with the findings of the Industrial Court unless they were found to be unreasonable, in the sense that no reasonable man or body of men could reasonably come to the conclusion that it did, or that the decisions of the Industrial Court looked at objectively, were so devoid of any plausible justification that no reasonable person or body of persons could have reached them* (see Lord Denning's judgment in *Griffiths (Inspector of Taxes) v. JP Harrison (Watford) Ltd* [1962] 1 All ER 909 at p 916, and judgment of Lord Diplock in *Bromley London Borough Council v. Greater London Council & Anor* [1983] 1 AC 768

A at p 821; [1982] 1 All ER 153 at p 159; [1982] 2 WLR 92 at p 100). **It is the ultimate decision of the Industrial Court when looked as a whole that matters.**

That is the approach suggested by so learned a judge as Mohd Azmi FCJ (as he was then). It is a view plainly binding upon B this court. Unfortunately, the learned judge in the present appeal overlooked the limits to the jurisdiction he was called upon to exercise.

[12] In the High Court case of *Sim Kooi Soon v. Malaysia Airline* C *System* [2005] 2 CLJ 797, Raus Sharif J (as he then was) stated that:

In the realm of industrial disputes, the jurisdiction of the High Court to issue order of certiorari is neither appellate nor a revisional jurisdiction. It is an "extraordinary original jurisdiction" of a supervisory character, D *with the object of enabling the superior courts to keep the inferior tribunals within the bounds of their authority. The High Court has no jurisdiction under s. 25 of the Courts of Judicature Act 1964 to interfere with the findings of fact reached by the Industrial Court on the ground that the decision is erroneous, except where there is a clear error of law on the face of the record. It cannot arrogate the powers of the court of appeal by* E *substituting its own judgment for that of the Industrial Court on question of fact, and it cannot review the evidence.* (*Non Metallic Mineral Products Manufacturing Employees Union & Ors v. South East Asia Fire Bricks Sdn Bhd* [1976] 1 LNS 85 FC). *The High Court may not utilize certiorari proceedings as a cloak to entertain what in truth is* F *an appeal against findings of fact* (*William Jack & Co (M) Sdn Bhd v. S. Balasingam* [1997] 3 CLJ 235 CA).

... Even if there was a mistake, the Court will not interfere if, based on the totality of evidence, the ultimate decision was proper and right (Goh Kean Hock v. Mahkamah Perusahaan Malaysia [2002] 5 MLJ 37). G

[13] Based on the above mentioned authorities, it is clear that the findings of fact reached by the Industrial Court should not be interfered with on ground(s) that the decision is erroneous, except where there is a clear error of law on the face of the record. As H such, the findings of the Industrial Court should not be interfered with or quashed simply because this Honourable Court is of the view that a different approach should have been taken by the Industrial Court as it is not the High Court's function to review, reassess, re-appreciate, reappraise evidence, or draw its own I inferences on the facts.

[14] The jurisdiction of the Industrial Court to strike out or dismiss a case without its merits being heard is derived from s. 29(g) of the Act which reads as follows:

> 29. The Court may, in any proceedings before it:
>
> (g) generally direct and do all such things as are necessary or expedient for the expeditious determination of the matter before it.

[15] In case of *Bank Pusat Kerjasama Bhd (in receivership) v. Mahkamah Perusahaan Malaysia & Anor* [1994] 4 CLJ 341, Siti Norma J (as she then was) had at p. 346 stated that:

> *Since s. 29(g) of the Act enabled the 1st respondent to strike out the 2nd respondent's case on 17 August 1992, without its merits being heard, likewise it is my considered opinion that the power to reinstate the very same case on good grounds being shown can be implied to the subsection* and to that end, Award No. 346/92 has been properly made within the framework of the Act.

[16] The question to ask in any particular case is what amounts to "good grounds" to warrant the Industrial Court's exercise of discretion to reinstate the claimant's case. In *Guardian Security Consultants Sdn. Bhd. v. Joe Helen M. Ponnu* [2003] 3 ILR 993 the Industrial Court stated:

> Thus therefore it is clear from the authority that this court has the power to reinstate the case on good grounds being shown. The question is what are good grounds? **Generally there are two and they as follows:**
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> 1. **Good reasons for the absence and**
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> 2. **there should not be inordinate delay in making the application.**
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> **It is the duty of the claimant to prove that he had good reasons for the absence.**
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> (i) In *Tan Cheng Hing v. World SPA Industries (M) Sdn Bhd* [2005] 1 ILR 529 the Industrial Court considered the claimant's past conduct as well as his reasons for failing to attend Court on the hearing date and dismissed the claimant's application to reinstate the case on the ground that the reason was untenable.

(ii) In *Hume Industries (M) Berhad lwn. Alias Rejab* [1999] 3 ILR 47 the Industrial Court dismissed the claimant's application to reinstate the case and held that the claimant's counsel's reason that he gave priority to a criminal trial was unacceptable.

[17] The application to reinstate the case before the Industrial Court is, therefore a matter within the discretion of the Industrial Court dependant on the facts and circumstances peculiar to each individual case. In this connection, the Industrial Court is enjoined by s. 30(5) of the Act to act according to equity, good conscience and the substantial merits of the case and the interests of both the employer and employee are to be given equal consideration. This means that that equity and good conscience would apply both ways. Section 30(5) of the Act:

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...

(5) The Court shall act according to equity, good conscience and the substantial merits of the case without regard to technicalities and legal form.

[18] Therefore, the issue before the court is whether on the facts there are good grounds shown by the applicant to successfully appeal to the good conscience of the Industrial Court to have her case reinstated (ie, whether there were good grounds to warrant reinstatement of her claim).

The Submissions By The Applicant

[19] The learned counsel for the applicant submitted that the Industrial Court acted in breach of its jurisdiction under s. 29(g) of the Act when it struck out the applicant's claim against the first respondent on 26 September 2005 despite of a ground being submitted in that the hearing fixed on 26 September 2005 be postponed to 27 September 2005 being the second day of the trial. This was because the learned counsel who was handling the matter was not present and was engaged in another continued hearing before the Sungai Petani Sessions Court on the same day.

[20] In this regard, the learned counsel for the applicant averred that notwithstanding Encik Izham's presence and the alleged valid explanation, the Industrial Court still insisted on striking out the

applicant's claim against the first respondent which was part-heard without considering the alleged explanation and application to postpone the case on 26 September 2005.

[21] The learned counsel for the applicant further submitted that the Industrial Court had failed to exercise its discretion under s. 29(g) of the Act for reinstatement of Case No: 3(9)/4-797/02 without considering the substantive issues of the applicant's claim but only based on the finding of fact made in relation to the events that transpired on 26 September 2005.

The Submissions By The Respondent

[22] It is respectfully submitted that postponement is at the absolute discretion of the court. In *Abdul Mutalib Dato' Seri Razak v. The Malaysian Bar and Anor* [1998] 2 CLJ 749 the court dealt with the issue of postponement made at the hearing without prior notice and struck out the appeal since the counsel for the appellant was not prepared to proceed with the hearing. The court further held as follows:

> *[1] Postponement is not as a matter of right. It is most improper to pre-empt the decision of the court. In exercising the discretion, the court has to consider the merits of the application. Thus, it is more prudent for counsels to write in to the court at least three days before the hearing of the application for postponement. A lack of response from the court must be assumed as a rejection of such an application and consequently, due preparation by counsels to proceed is needful for the hearing. Conversely, if the reasons forwarded are valid and a postponement is granted, the court's time may be utilized to hear another case.*
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> *[2] An application for postponement made at the commencement of the hearing of a case can only be granted if, firstly, there are valid and reasonable grounds for the postponement, and secondly, the applicant can explain why the court has not been informed of the application before the hearing date. In the present case, the application was only made orally on the day of the hearing. Nonetheless the merits of the application was heard but counsel for the appellant was unable to give any valid and reasonable grounds for the request of a postponement, nor reasons for the non-application of a postponement, in writing, prior to the hearing date.*

[23] The applicant's averments/allegations in this regard are without merit and unsupported by any evidence. Based on the unrebutted evidence adduced before the Industrial Court, it is clear that:

(i) prior to 26 September 2005, neither the applicant nor her counsel made any application to the Industrial Court to adjourn/ postpone the continued hearing scheduled on 26 September 2005 on the ground that the applicant's counsel would be engaged in the Sungai Petani Sessions Court or that the said date was unsuitable. In fact, both the applicant and her counsel were absent on the hearing scheduled on 26 September 2005. It is apparent that the applicant and her counsel adopted a lackadaisical attitude and took it for granted that the court would grant an adjournment/postponement of the hearing;

(ii) no reason(s) were provided as to why priority was not given to the continued hearing before the Industrial Court despite the alleged merits of the applicant's claim against the first respondent;

(iii) although the applicant's counsel averred that he had instructed En. Izham to postpone the case before the Industrial Court until completion of the continued hearing at the Sungai Petani Sessions Court, on 26 September 2005, En. Izham was only present in court at about 10am, which was after the Industrial Court Interpreter contacted the applicant's counsel and informed them to be present before the Industrial Court, forthwith;

(iv) although En. Izham appeared on behalf of the applicant's counsel and applied to adjourn the continued hearing scheduled on 26 September 2005 on the ground that the applicant's counsel was in Sungai Petani Sessions Court, he could not provide any explanation to the learned Chairman of the Industrial Court's query as to why the applicant's counsel was in Sungai Petani Sessions Court when the applicant's claim against the first respondent was scheduled for hearing on the very same day (ie, 26 September 2005).

[24] It must be further noted that in the present case, the application to postpone was only made orally on the date of the hearing (ie, on 26 September 2005). Nonetheless, the merits of the said application was heard by the Industrial Court, but there were neither any valid or reasonable grounds given for the postponement nor reasons given for the non-application of a postponement, in writing, prior to the hearing date.

[25] Therefore, on the facts and circumstances, it was fair and just for the Industrial Court to have refused the application to postpone the hearing and to strike out the applicant's claim against the first respondent on 26 September 2005 based on the grounds submitted by the first respondent. Accordingly, the Industrial Court did not err in law or in fact in handing down the striking out award dated 26 September 2005.

[26] As such, the applicant's contention otherwise is without merit and is unsupported by evidence. On this ground alone, the applicant's application ought to be dismissed with costs.

Whether The Industrial Court Erred In Law When It Dismissed The Applicant's Application To Reinstate Case No. 3(9)4-797/02, Without Considering The Substantive Issues Of The Applicant's Claim Against The First Respondent, But Only Based On The Findings Of Fact Made In Relation To The Events That Transpired On 26 September 2005

[27] The learned counsel for the applicant submitted that on the facts of the present case, the Industrial Court had no jurisdiction under s. 29(g) of the Act to hear the applicant's claim against the first respondent on the substantial merits. This is because in an inquiry under s. 29(g) of the Act in respect of an application to reinstate a case, the jurisdiction of the Industrial Court is limited to determining whether there were good grounds to warrant reinstatement of her claim in Case No. 3(9)/4-797/02).

[28] In reply the respondent's counsel submitted that the existence of triable merits in itself does not justify the reinstatement of the applicant's claim against the first respondent, especially when there are repeated acts of indignities on the part of the delinquent party and no good reasons are shown to warrant the exercise of the Industrial Court's discretion to reinstate the applicant's claim.

Finding Of The Court

[29] The court is of the considered view that in the instant case, the applicant has to show that the learned Chairman of the Industrial Court had erred in law when he held that the applicant had failed to show good grounds to warrant reinstatement of her claim against the first respondent, (see *Guardian Security Consultants Sdn. Bhd (supra)*).

[30] In the grounds of judgment of the learned Chairman of the Industrial Court which is annexed by the applicant as an exh. 'CTL 10' in encl. 2, the learned counsel for the applicant had on several other occasions caused the proceeding to be delayed or postponed for failure to be present. The learned Chairman of the Industrial Court further considered the failure by the applicant and her counsel to appear on 26 September 2005 as the 'last straw which breaks the camel's back.'

[31] The court agrees with the remark made by the learned Chairman of the Industrial Court that it cannot tolerate the indignities trust upon it and must at all costs reinstate and hear and determine the case in its totality.

[32] It is perhaps useful as a reminder to counsels that the Bar Council has seen it fit to make rules relating to practice and etiquette pursuant to s. 77 of the Legal Profession Act 1976 and cited as the Legal Profession (Practice and Etiquette) Rules 1976. The relevant rules in the instant case are rr. 6(a) and 24(a) respectively.

[33] Rule 6(a) states that: An advocate and solicitor shall not accept any brief unless his reasonably certain of being able to appear and represent the client on the required day.

[34] Rule 24(a) states that: An advocate and solicitor shall make every effort to be ready for trial on the day fixed.

[35] These two rules are made to ensure that an advocate and solicitor is able to represent the client on the required day and also to make every effort to be ready for trial on the day fixed.

[36] In the instant case, the learned counsel for the applicant has clearly breached the said rules by not being present and be ready for trial on 26 September 2006.

[37] The court also agrees with the conclusion made by the Industrial Court that the applicant has failed to show good grounds to warrant reinstatement of her claim.

[38] The court also finds that the Industrial Court had properly appreciated the facts and the law in considering the merits of the applicant's application for reinstatement and its decision making was not tainted with procedural impropriety.

[39] In all the circumstances, the court dismissed the applicant's application (encl. 1) with costs.